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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN EDWARD LYON, Defendant and Appellant.	C078690 (Super. Ct. No. NCR89471)

Following the denial of his motion to suppress evidence pursuant to Penal Code section 1538.5 (further unspecified references are to this code), defendant Stephen Edward Lyon entered a negotiated plea of no contest to two felony counts of attempting to engage in sexual intercourse with a minor (§§ 261.5, subd. (c), 664). The trial court placed defendant on five years' formal probation.

On appeal, defendant contends the trial court erred in denying his motion to suppress. We disagree and shall affirm.

FACTUAL BACKGROUND

The facts are taken from the evidence presented at the hearing on defendant's motion to suppress evidence.

In December 2013 Eric Clay, an investigator for the Tehama County District Attorney's Office, was working an investigation involving people using the Internet to find under-aged children for sex. Using undercover aliases and e-mails, Clay posted and responded to ads on Craigslist, an Internet website. One of the aliases used by Clay was "Tiffany Wells," a 15-year-old female.

On December 17, 2013, Clay, posing as Tiffany, posted an ad on Craigslist titled, "Need a daddy to party with - w4m (bluff)," where "w4m" meant woman for man and "bluff" was a reference to Tiffany's location in Red Bluff. The text of the ad was as follows: "[Y]eah i am a messed up girl needing a daddy figure that can party with his little girl. u give me what i want and i give u what u want=) ps i'm real and not into playing games."

An individual using the name "Redding Guy" responded to the ad. Over the next several days, Clay engaged in e-mail communications with Redding Guy. During the course of those communications, Tiffany said she was looking for "molly" (a nickname for the drug Ecstasy). Redding Guy said he could not get the drug, but offered money for her to get some in exchange for "20-30 minutes of fun." Tiffany said, "i dont want to get pregnant," and Redding Guy responded, "No problem." When Tiffany asked, "you will use condoms?" Redding Guy responded, "Of course." At some point, Tiffany told Redding Guy, "I am almost 16." [1] Redding Guy agreed to meet and told Tiffany he could obtain the ecstasy for her. The two eventually agreed to meet at the Walmart store in Red Bluff, at the Garden Center, between 2:10 p.m. and 2:20 p.m. Tiffany said she would be wearing a black and purple coat, and Redding Guy said he would be wearing a black shirt

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[1] Three months prior to the December 13, 2013 ad, Clay posted an ad as Tiffany under the thread, "fantasy." Defendant exchanged a series of 24 sexually explicit messages with Tiffany. During that exchange, defendant claimed he was 24 years old, and Tiffany said she was 15 years old.

and jeans and driving a gray Ford Escape. He said, "U wear the purple black coat, and ill [sic] find u, ok."

On December 19, 2013, Clay drove to the Red Bluff Walmart store and positioned his unmarked vehicle so that he could see the Garden Center. He saw a newer gray Ford Escape drive through the parking lot in front of the Garden Center, circle the building, then make a second pass in front of the Garden Center. At about the same time, he received an e-mail from Redding Guy that read, "I'm here." Clay responded, "Ok." Clay advised Tehama County District Attorney's Office Investigator David Baker, who was positioned out of sight in a vehicle with "lights and sirens but no markings," that the Ford Escape had arrived and was leaving the parking lot. Baker indicated he too had seen the vehicle and that the driver appeared to be looking for someone.

Baker stopped defendant's vehicle in a nearby Walgreen's parking lot. He asked defendant to get out of the car, had him stand by the front driver's side tire, and asked him for his driver's license. Baker also asked if defendant was in communication with anyone in the area. Defendant said, "No." When Baker asked defendant if he had a cell phone, defendant said he did but refused to allow Baker to look at it. Baker told defendant he was going to secure his phone and attempt to obtain a warrant to search the contents of the phone. Defendant said something like he "was going to be going somewhere else to pickup somebody or something and he didn't want to be detained for that length of time" and told Baker he could search for the phone. Based on defendant's consent, Baker searched for and retrieved the phone from the vehicle.

Within minutes, other officers arrived at the Walgreen's parking lot. When Clay arrived, he recognized the car as the same one he had seen twice drive past the Walmart Garden Center. Baker handed Clay defendant's driver's license and cell phone and told Clay that, after initially refusing Baker's request to search the phone, defendant gave consent.

Clay searched defendant's phone and initially found nothing. After receiving *Miranda* warnings,[2] defendant said he lived in Big Bend, a town 45 minutes from Redding, and told Clay he was headed to Sacramento to pick up a friend from the airport when he stopped in Redding to do some Christmas shopping. When Clay asked who defendant was picking up from the airport, defendant said he was not comfortable answering the question. Defendant explained he had rented the car because he had dropped his car off at the Big O Tires in Redding to have new tires installed.

After asking defendant a few more questions, Clay told defendant, "Wait here and don't move. You're detained. [Y]ou're not free to leave." Clay searched defendant's car and found in the pocket of the car door a bag containing a box of condoms, a bottle of personal lubricant, and a receipt showing those items had been purchased in Redding "an hour or two before." Clay also found approximately $2,000 in cash in the vehicle and on defendant's person. Clay told defendant he was under arrest.

Clay searched defendant's phone a second time and found an e-mail account for Redding Guy and e-mails to Tiffany Wells.

PROCEDURAL HISTORY

Defendant was charged by information with arrangement of meeting with a minor for the purpose of engaging in lewd and lascivious behavior (§ 288.4, subd. (b)—count I) and contact or communicating with a minor with knowledge and intent to commit specified offenses (§ 288.3, subd. (a)—count II).

Defendant filed a motion pursuant to section 1538.5 to suppress all evidence related to any statements made by him in the course of the investigation and arrest, anything described in the police report, any physical evidence obtained in the investigation, and any inculpatory evidence revealed during discovery. The motion

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

argued the actions of the police violated defendant's federal and state constitutional rights and the warrantless search lacked probable cause. The prosecution opposed the motion.

Following a two-day hearing, the trial court denied defendant's suppression motion.

The prosecution amended the information to allege two additional felony counts of attempting to engage in sexual intercourse with a minor (§§ 261.5, subd. (c), 664—counts III & IV). Defendant entered a negotiated plea of no contest to counts III and IV in exchange for dismissal of counts I and II and a stipulated grant of five years' probation subject to specified terms and conditions, including no section 290 sex offender registration and no sexual offender treatment program.

The trial court imposed the stipulated five-year probation term, ordered defendant to serve 120 days in county jail, and imposed fees and fines. The court awarded defendant four days of presentence custody credit.

Defendant filed a timely amended notice of appeal.

DISCUSSION

I

Denial of Suppression Motion

Defendant contends the trial court erred in denying his motion to suppress.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well settled. We view the record in the light most favorable to the trial court's ruling and defer to its findings of historical fact, whether express or implied, if they are supported by substantial evidence. We then decide for ourselves what legal principles are relevant, independently apply them to the historical facts, and determine as a matter of law whether there has been an unreasonable search and/or seizure." (*People v. Knight* (2004) 121 Cal.App.4th 1568, 1572; accord *People v. Lenart* (2004) 32 Cal.4th 1107, 1118-1119.)

"The Fourth Amendment to the federal Constitution guarantees against unreasonable searches and seizures by law enforcement and other government officials." (*People v. Parson* (2008) 44 Cal.4th 332, 345.) Warrantless searches are presumed to be unreasonable, " 'subject only to a few specifically established and well-delineated exceptions.' " (*People v. Diaz* (2011) 51 Cal.4th 84, 90 (*Diaz*).) The prosecution bears the burden of demonstrating a legal justification for a warrantless search. (*People v. Redd* (2010) 48 Cal.4th 691, 719.)

First, defendant argues there was no probable cause to arrest him. We disagree. "An arrest is valid if supported by probable cause. Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime." (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

Here, probable cause existed to arrest defendant. Using the name Redding Guy, defendant made a plan to meet Tiffany, who said she was "almost 16," for a sexual encounter on December 19, 2013, at the Garden Center of the Walmart store in Red Bluff between 2:10 p.m. and 2:20 p.m. He said he would give her money and Ecstasy in exchange for sex and promised he would use condoms. He told her his name was "[B]illy" and said he would be wearing a black shirt and jeans and would be driving a gray Ford Escape. Clay, acting as Tiffany, told defendant, "tell me when you are there and I will walk over."

At the appointed time, Clay positioned his undercover vehicle near the Red Bluff Walmart Garden Center. He observed defendant's newer gray Ford Escape drive through the Walmart parking lot past the Garden Center, circle the building, and then drive past the Garden Center a second time. Defendant, the driver, was wearing dark-colored clothing. At 2:13 p.m., Clay received an e-mail from Redding Guy that read, "I'm here." At 2:15 p.m., Clay responded, "Ok." Baker had also seen the gray Ford Escape and had

noticed the driver "looking for something or somebody." Within minutes, Baker stopped the vehicle in a nearby Walgreen's parking lot.

Defendant argues it was not reasonable to infer he was Redding Guy from "a plain gray Ford Escape driving by a Walmart in a busy city on the afternoon of the last Thursday before Christmas where the driver is wearing 'something dark' and is 13 years older than the expected suspect, in a car licensed in a state other than where the suspect ostensibly is from." Again, we disagree.

Defendant's vehicle was the exact make, model, and color of Redding Guy's vehicle. He drove the vehicle to the precise location Redding Guy and Tiffany agreed upon, at the precise time they agreed upon, drove by the Garden Center as agreed, circled the store and drove by the Garden Center again. He was wearing dark clothing and was the only person visible in the vehicle, and Clay and Baker both noticed he appeared to be looking for someone or something. Clay received the "I'm here" e-mail from Redding Guy at 2:13 p.m., squarely within the very narrow agreed-upon window of time, 2:10 p.m. to 2:20 p.m. All of these facts were consistent with the correspondence between Redding Guy and Tiffany. The totality of these facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that defendant, the driver of the gray Ford Escort, was Redding Guy and the vehicle contained evidence of a crime.

Defendant argues nothing discovered during the traffic stop was sufficient to develop probable cause to search his person, vehicle, or cell phone. In that regard, he notes: Redding Guy told Tiffany his name was Billy, but defendant's name is not Billy; Redding Guy said he was 24, but defendant was actually 37; Redding Guy said he would be wearing a black shirt, but defendant was wearing a black jacket; Redding Guy said he was from Redding, but the vehicle defendant was driving had Washington license plates; Redding Guy planned to meet Tiffany, but defendant claimed he was headed to the Sacramento airport and had only stopped in Red Bluff to do some Christmas shopping.

In light of our conclusion that probable cause existed to stop and arrest defendant, the lawful search incident to his arrest requires no additional justification. "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Arizona v. Gant* (2009) 556 U.S. 332, 351 [173 L.Ed.2d 485].) Defendant was arrested for arranging to meet Tiffany, a minor, for the purpose of engaging in lewd and lascivious behavior. It was reasonable to believe the gray Ford Escort contained evidence of that crime, namely, the condoms, Ecstasy, and money Redding Guy promised to bring with him.

In any event, independent of defendant's arrest, Baker's search of the vehicle was justified under the automobile exception to the warrant requirement. "If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found." (*Arizona v. Gant*, *supra*, 556 U.S. at p. 347.) "Under the automobile exception to the warrant requirement," the police have probable cause to search if they believe " 'an automobile contains contraband or evidence' " of a crime (*People v. Waxler* (2014) 224 Cal.App.4th 712, 718 (*Waxler*)) and may search " ' " 'every part of the vehicle and its contents that may conceal the object of the search.' " ' " (*Id.* at p. 719.) Whether there is probable cause to search a car is governed by the same standards as any other probable cause determination: could a neutral and detached magistrate make a decision, considering the totality of the circumstances, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, [that] there is a fair probability that contraband or evidence of a crime will be found in a particular place[?]" (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [76 L.Ed.2d 527].) Here, the objective facts known to Baker—the e-mails between Redding Guy and Tiffany referencing Tiffany's minor age and the details of their agreement to meet and

engage in sexual conduct, and defendant's appearance at the exact appointed place and time in the vehicle described in those e-mails—would have justified the issuance of a warrant.

It is also worth mentioning that the fact defendant was arrested just after his vehicle was searched is of no moment here. If the arrest and search are substantially contemporaneous with one another, it is immaterial if the search preceded the arrest, or the arrest preceded the search. (See *United States v. Edwards* (1974) 415 U.S. 800, 803 [39 L.Ed.2d 771]; *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111 [65 L.Ed.2d 633]; *People v. King* (1971) 5 Cal.3d 458, 463 ["[I]t is immaterial that the search preceded, rather than followed, the arrest."] As previously discussed at length, there was, at the time of the stop at Walgreen's, probable cause to arrest. Thus, the arrest was justified at the time of the search. (*People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189.)

We conclude there was probable cause to stop and arrest defendant, and the search of his vehicle was a valid search incident to that arrest. The trial court did not err in denying defendant's motion to suppress.

II

Consent to Search Cell Phone

Next, defendant contends his consent to search his cell phone was improperly gained by threats to obtain a search warrant for which there was no probable cause. The claim lacks merit.

"[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 [36 L.Ed.2d 854]; accord *People v. Jenkins* (2000) 22 Cal.4th 900, 971.) "[N]o single factor is dispositive of this factually intensive inquiry." (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578.) We determine whether it was reasonable for the officer to conclude, based on the circumstances, that the consent given was voluntary. (*People v.*

Gurley (1972) 23 Cal.App.3d 536, 555.) We must accept the trial court's finding defendant's consent was voluntary "unless there is substantial evidence to the contrary." (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558 (*Ramirez*).)

Here, it was reasonable for Baker to determine defendant consented to the search for and of his cell phone. Baker stopped and detained defendant in the Walgreen's parking lot, instructed him to get out of his vehicle, and asked defendant for his driver's license. At that point in time, Baker was the only law enforcement officer present. He did not have his weapon drawn, nor was defendant in handcuffs or yet placed under arrest. Even assuming defendant had been placed in custody, "custody in itself has never been held sufficient to demonstrate [defendant's] consent was not voluntary." (*Ramirez, supra,* 59 Cal.App.4th at p. 1559, citing *United States v. Watson* (1976) 423 U.S. 411, 424-425 [46 L.Ed.2d 598].)

Contrary to defendant's characterization that he was "ordered by an armed officer to get out of his car" and "told he must give up his cell phone or he would be detained until the officer could get a warrant," Baker testified he asked defendant if he had a cell phone and defendant said he did. When Baker asked if he could "look at it," defendant responded, "No." Baker honored defendant's refusal, but then said he was going to secure the phone and attempt to obtain a warrant to search it. Baker, who was the only officer present at the time, was wearing a gun, but testified it was possible it was not even visible to defendant at the time of the stop. There was no use of force or coercion by Baker, as further evidenced by the fact that defendant gave consent because he was going somewhere to pickup somebody and simply did not wish to be detained for that length of time. While it was implicit in Baker's statement that defendant could be detained while a warrant was obtained, any such detention would have been reasonable in light of the existence of probable cause, as previously discussed. Moreover, consent to search is not necessarily rendered involuntary by the requesting officers' advisement that they will try to get a search warrant should consent be withheld. (*People* v. *Ruster* (1976) 16 Cal.3d

690, overruled on other grounds in *People v. Jenkins* (1980) 28 Cal. 3d 494, 503; see *People* v. *Ward* (1972) 27 Cal.App.3d 218, 225.) We uphold the trial court's finding that defendant's consent was voluntary.

Finally, defendant claims the search incident to arrest exception to the warrant requirement does not apply to a cell phone pursuant to *Riley v. California* (2014) 573 U.S. ___ [189 L.Ed.2d 430] (*Riley*), and argues the exclusionary rule should apply.[3]

In *Riley*, the United States Supreme Court held that "a warrant is generally required before [searching the data stored on a cell phone], even when a cell phone is seized incident to arrest." (*Riley*, *supra*, 573 U.S. at p. ___ [189 L.Ed.2d at p. 451].) However, the *Riley* court noted that information on a cell phone is not immune to search and stated that, while the search incident to arrest exception does not apply to cell phones, "other case-specific exceptions may still justify a warrantless search of a particular phone," one of them being the exigent circumstances exception. (*Ibid*.) But exigent circumstances is not the only other exception that may apply to a search of cell phone data.

Prior to *Riley*, case law permitted the examination of the cell phone under the automobile exception. (*Arizona v. Gant, supra,* 556 U.S. at p. 347 [probable cause to believe vehicle contains evidence of criminal activity authorizes search of any area of vehicle where evidence might be found]; *Waxler, supra*, 224 Cal.App.4th at pp. 718-719 [same].) Where there is probable cause, the search extends to closed containers. "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*California v. Acevedo* (1991) 500

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[3] Defendant correctly notes, as do the People, that whether the good faith exception to the exclusionary rule applies to cell phone evidence obtained without a warrant before *Riley* is pending before the California Supreme Court in *People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted November 25, 2014, S221852.

U.S. 565, 580 [114 L.Ed.2d 619].) " 'A number of courts have analogized cell phones to closed containers and concluded that a search of their contents, is, therefore, valid under the automobile exception . . . .' " (*Diaz, supra*, 51 Cal.4th at p. 100, fn. 15, overruled on other grounds in *Riley*, quoting *State v. Boyd* (2010) 295 Conn. 707 [992 A.2d 1071, 1089, fn. 17].)

We conclude the automobile exception applied here. As previously discussed, defendant used his cell phone to communicate with Tiffany and plan, among other things, where and when they would meet, what he would bring (condoms, Ecstasy, money), and how they would recognize each other. Thus, probable cause existed to believe that evidence of the charged sex crimes would be found in the data storage of the cell phone, and the automobile exception authorized the search of the cell phone just as it would have allowed the search of any other closed container found in defendant's Ford Escape. Assuming *Riley* can be interpreted to apply even when a cell phone is seized pursuant to the automobile exception, the good faith exception applies—Investigator Baker was entitled to reasonably rely on the state of the law prior to *Riley*. (*Davis v. United States* (2011) 564 U.S. 229, 248-249 [180 L.Ed.2d 285].)

The trial court did not err in denying defendant's motion to suppress the fruits of the cell phone search.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BUTZ, J.

MAURO, J.